Nos. 12,597 and 12,607

United States Court of Appeals

For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANTS' SUPPLEMENTAL BRIEF.

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THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT BRIDGES ON THE SECOND COUNT OF THE INDICTMENT.

The second count of the indictment (Tr. 6-7) charges that appellant Bridges did "wilfully and knowingly make a false statement under oath" by giving the following answer to the following question:

> "Q. Do you now or have you ever, belonged to the Communist Party in the United States?
> A. I have not; I do not."

The answer so given is alleged to have been, "as said defendant then and there knew",[1] false; it is

[1]The indictment further alleges that "said defendant did not then and there believe said answers * * * to be true, and the said answers were * * * then and there believed and known to him to be false." (Tr. 7.)

also alleged that "in truth and in fact said defendant at the time of so testifying belonged to and was a member of the Communist Party in the United States, and had belonged to and had been a member of said Communist Party in the United States from 1933 up to and including said 17th day of September, 1945."

Thus the issue framed by the plea of not guilty was whether or not appellant Bridges had ever belonged to or been a member of the Communist Party in the United States and believed that he had. In order to determine that issue in its favor, the Government had to prove beyond a reasonable doubt that appellant Bridges had been a member of the Communist Party in the United States and believed that he had. Unless its proof established that fact—i.e., the fact of appellant Bridges' actual membership in the Communist Party to his own belief—its evidence was insufficient to sustain the conviction.

The trial Court correctly recognized that evidence of sympathy with the aims of the Communist Party; casual or intermittent cooperation with it; association with it or even affiliation with it, did not constitute actual membership, and it so charged the jury (Tr. 7891-7893).

An analysis of the evidence proffered by the government on this issue shows that it is insufficient to sustain a conviction upon the basis of these very instructions which, so far as they went, correctly stated the law. The real difficulty with the instructions on this point is that while they told the jury what it

could *not* look to in order to convict, they did not with any precision advise the jury of the factors it *could* consider to justify a conviction.

In this regard the trial Court merely instructed the jury that whether or not appellant Bridges was a member of the Communist Party was a question of fact "which you are to determine from all of the evidence * * * direct as well as circumstantial" (Tr. 7892). This is contrary to the perjury rule in the federal Courts (*Clayton v. United States,* 284 F. 537, 539 [4 Cir., 1922]; *United States v. Otto,* 54 F. (2d) 277, 279 [2 Cir., 1931]; *Radomsky v. United States,* 180 F. (2d) 781, 782-3 [9 Cir., 1950]) and undoubtedly this error lead the jury to convict upon the basis of insufficient evidence.

For it is perfectly plain that the evidence offered by the government on the issue of appellant Bridges' alleged membership in the Communist Party does not establish the fact. Not only is it all circumstantial, and not only are the circumstances at least as consistent with the theory of nonmembership as with the theory of membership, but the very witnesses called by the government to establish membership proved conclusively that the evidence was insufficient to sustain this conviction.

I. EVIDENCE CONCERNING MEETINGS AND COOPERATION WITH ALLEGED COMMUNISTS.

The great bulk of the testimony offered by the government's witnesses had to do with the presence of appellant Bridges at meetings or gatherings which the government characterized as "communist". Practically every government witness made reference to such meetings and some of them testified to nothing else.

Yet this testimony—no matter how voluminous it was—is by the admission of the very witnesses who gave it, insufficient to establish membership in the Communist Party.

In the first place, the only basis that these witnesses had for designating the meetings as Communist Party meetings was their claimed knowledge that all the persons present were members of the Communist Party. But in turn these witnesses claimed that the persons present were members of the Communist Party because the witnesses had on some prior occasion seen them at Communist Party meetings. (Tr. 892, 905, 911, 935, 938, 982, 1913.)

This is literally lifting one's self by one's bootstraps!

Several of the government's witnesses were permitted to testify, over objection, to the communist character of these meetings despite the fact that there were present at such meetings persons whom they had never seen before or since and whose identity they were unable to establish. (Tr. 1799, 1801, 1820.)

In the second place—and the significance of this cannot possibly be overlooked—the government's witnesses testified, to their own knowledge, of the attendance at such very meetings of persons who were not members of the Communist Party.

John Schomaker testified that even prior to the time he claims appellant Bridges became a member of the Communist Party, appellant Bridges attended such meetings, including meetings held in the Communist Party offices. (Tr. 957-963.) K. C. Krolek testified that there were many meetings held between Communist Party members and trade unionists who were not Communist Party members. (Tr. 1957-1958.) This witness specifically declared:

> "* * * that to people who were in the Communist Party as well as union leaders themselves, there were occasions at which, for practical purposes, a meeting could be considered a Communist Party meeting and yet have an outsider who may not have been a Communist Party member present at that meeting.
>
> Q. That is exactly what I was probing to discover. In other words, there would be a real Communist Party meeting and yet there could be a person present, trade union leader or otherwise, who might not himself be a member of the Communist Party?
>
> A. That is correct." (Tr. 1964-1965.)

This witness gave specific incidents at which this occurred (Tr. 1965-1967) and admitted that even after he had left the Communist Party he attended at least one such meeting (Tr. 1961). This particular

meeting was one which on his direct examination he had said was attended by appellant Bridges and which he claimed was open only to Communist Party members. This was one of the meetings, therefore, upon the basis of which the government sought to prove its claim of membership against appellant Bridges. (Tr. 1927.) Yet the witness was in attendance at a time when he was not a member of the Communist Party!

Lewis H. Michener testified that before he joined the Communist Party he participated in discussions about labor matters with people whom he knew to be Communist Party members, and that as a matter of fact there were occasions when he was the only non-member present:

> "Q. And in those discussions, would you be talking over matters of policy affecting your own union and the men who worked with you?
>
> A. Yes, sir, that would be the general discussion would follow in that particular connection." (Tr. 3444.)

George Wilson also testified that prior to the time he claims to have joined the Communist Party he attended meetings of this character with members of the Communist Party. (Tr. 3652-3653.)

The witness Krolek testified to the distinction between Communist Party meetings whose attendance was limited to Communist Party members, and Communist Party meetings which were attended by persons who were not members of the Communist Party.

The former, he said, considered Communist Party affairs, such as party recruitment and organization, the latter were of "a strictly trade union nature". (Tr. 1967.)

Now the interesting thing about the meetings at which the government witnesses placed Bridges, is that every one of them were of "a strictly trade union nature".

For example, the witness Schomaker testified to a meeting at Grants Pass, Oregon, in 1936, at which

> "* * * the discussion was around the question of the determination [termination?] of the waterfront agreements with the employers [and] * * * the people in Tacoma, the longshore group in Tacoma, were rather hostile to the way the elections went [and]
>
> We discussed the ways and means to bring the two—that is the northwest maritime groups—closer to the California and Southern California groups. And that was the extent of the discussion * * *" (Tr. 905.)

This same witness testified about a meeting held in 1935 during the sessions of the California State Federation of Labor convention in San Diego at which he said Bridges gave a report:

> "Well, at that particular time in 1935 the beef centered around the sailors, the Sailors Union of the Pacific, and Paul Scharrenberg was secretary, and in that summer the sailors—Paul Scharrenberg was also secretary of the California Federation of Labor, and the sailors in

that year, that summer, they expelled him from the Sailors Union of the Pacific, although he still held his job as the California secretary of the State Federation of Labor. The sailors were pretty hot about this being so. They wanted him removed not only as the secretary of the Sailors, but also removed as the California State Federation of Labor secretary, and that was the main point in the convention as far as—that was one of the main points in the convention, that is, as far as we were concerned, as far as the maritime workers were concerned, and men, of course—the maritime unions had no representation outside of Scharrenberg in the Federation, so they sought and put some of our men either as vice president of one—I think our sub-district was No. 9, and we endeavored to get one of our persons as a vice president and also to run opposition, if possible, against Scharrenberg as secretary." (Tr. 923-924.)

Stanley Hancock also testified about this meeting—as a matter of fact, this was the only incident[2] to which this witness testified.

Concerning it he said:

"We were interested in preparing a slate of nominees to oppose the vice-presidents of the American Federation of Labor, the California Division, and the Secretary of the State Federation." (Tr. 1765.)

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[2]The government must be contending (contrary to the testimony of its own witnesses) that attendance at such a meeting is proof of actual Communist Party membership, otherwise why did it call a witness to testify to this one incident alone?

"We had this meeting to discuss, and we did discuss, the individuals up and down the State that we would be willing to support on the floor of the convention for the positions of either vice-presidency or secretary". (Tr. 1767.)

"In addition to the selection or endorsement of nominees for office in the State Federation of Labor, we discussed a number of resolutions which we were interested in placing before the convention.

Q. And what was the nature of these resolutions?

A. Well, there were several. One dealt with the desire—with our desire of having the Federation endorse a labor party. Another dealt with the convention going on record as opposing the criminal—California Criminal Syndicalism Law; another had to do with voicing determination against vigilante activities in Sonoma County. Another resolution was to condemn the arrest of some men popularly known as—the case was known as the Modesto case." (Tr. 1772.)

"The aim of that resolution was to present an argument for the State Federation of Labor sponsoring a labor party, a California Labor Party." (Tr. 1822.)

The witness Schomaker testified to a meeting in 1934 in Santa Clara County at which he said Earl Browder, the then secretary of the Communist Party, was present. Of this meeting he said:

"* * * We began discussing the strike and the progress it had made, and the general situation concerning the strike." (Tr. 939.)

"We all discussed the strike and the aspects of it and what was to be expected in it, and the future conduct of it.

Q. Can you tell us to your best recollection what Mr. Browder said?

A. Well, the best of my recollection was that, the fact that there was quite a bit of terror being exerted on the strike from various sources, from the police and private agencies, tear gas salesmen that were applying pressure in the form of shooting tear gas into the strikers. And in general, the atmosphere was one of tension and Browder suggested that what needed to be done was to get more support for the strike. That is, more support for it, to line up people on the side of the strikers against these forces that were of terror and violence against them." (Tr. 940.)

Henry Schrimpf also testified about this same meeting. He said:

"And Darcy done quite a bit of talking about the general situation, and the functions of the strike." (Tr. 1360.)

"Well, the most important thing with our strike at this stage was holding the men together. The men, they had gone through an awful lot of hard times and abuse on the waterfront. But they were very short of money. We had no money when we went out, and most of the men were caught short, never had a chance to put a nest egg away. So the real object was in continuing this strike, how to bolster up the morale of the men. And naturally, an important issue of all strikes in supporting and building up and

holding the morale of the men is to continue to gather strong support from the outside. This I do recall was one of the facts there, and what would be the best means and the best result and how we would get more support not only from organized labor, but from the general public." (Tr. 1361-1362.)

The witnesses Krolek and Mervyn Rathborne testified to a meeting held in Long Beach in 1936 during sessions of a convention of the Maritime Federation of the Pacific, an organization composed of various maritime unions. Krolek described the meeting:

"The meeting itself was concerned with discussion pertaining to the slate of progressive candidates that would be recommended on the floor of the Maritime Federation of the Pacific Convention which was being held currently at that time. I believe that was the main purpose—the discussion of the individuals from the standpoint of presidency, vice-presidency, secretaryship and so forth—minor officials—of the Maritime Federation of the Pacific for the forthcoming year, and the program that was to be—was to have been determined upon at this meeting was the proponency or the sponsorship of certain people who the communists, *shall we say,* and THE LIBERAL MOVEMENT combined felt to be to the best interests of the Maritime Federation of the Pacific." (Tr. 1918-1919.)

"Everyone that was present at that meeting partook of the general discussion and the matter, the paramount matter of prime importance was

> the determination, the selection of the candidates, the sale of officers who would be supported by THE PROGRESSIVE ELEMENT in the currently held Maritime Federation Convention." (Tr. 1923.)

The witness Michener testified to only two meetings[3]. Both of them were meetings attended by labor representatives who had a legitimate interest in the problems discussed because the problems discussed were exclusively labor problems.

The first one was a meeting late in 1940 in San Francisco.

> "The problem regarding Labor's Non-Partisan League at that time was the allocation of funds between the northern part of the State and the southern part of the State * * * to see what arrangements could be worked out regarding the allocating the funds between Northern California and Southern California of the Labor's Non-Partisan League funds.
>
> The Labor's Non-Partisan League, your Honor, was the political arm for the CIO during that period of time * * *
>
> The net result of the discussion on Labor's Non-Partisan League * * * was that the funds should be equally distributed between the Northern and Southern Divisions of California." (Tr. 3346-3348.)

The second meeting that he attended was in November, 1943, at Philadelphia during the course of a

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[3]See note 2, supra.

National CIO Convention. It had to do with the substitution of one CIO official for another in a California State CIO job. (Tr. 3360-3363.)

Both George Wilson and Mervyn Rathborne testified to a meeting in the Governor Hotel in San Francisco which took place some time between 1942 and 1944. The subject of the discussion was the settlement of the controversy that had arisen between Rathborne, as Secretary of the California State CIO Council, and one Goldblatt, as Secretary-Treasurer of the International Longshoremen's & Warehousemen's Union. The occasion for the conference being held at the Governor Hotel was the fact that Rathborne had a room there during the then pending State CIO Convention. (Tr. 3649-3652, 5885.)

From the foregoing it appears that the evidence just discussed could not be regarded as probative of membership in the Communist Party upon any basis. In other words, merely proving that appellant Bridges occasionally and intermittently met with persons claimed to be members of the Communist Party and discussed with them matters of trade union concern, does not begin to prove that he was an actual member of that party.

More than that, this evidence clearly does not and cannot establish the basis for a belief on the part of appellant Bridges that the answer he gave in 1945 was false and not true. On the contrary, when he testified in 1945, Bridges well knew that the agencies and courts which had passed upon the question re-

garded such evidence as insufficient to establish affiliation with, let alone membership in, the Communist Party.[4] On the basis of such evidence alone, therefore, it cannot be said that appellant Bridges knew or believed his testimony was contrary to the truth.

It is next contended by the Government, and several of its witnesses testified, that appellant Bridges was a member of the Communist Party because he "followed instructions" of persons described to be communists. The Government's evidence is very hazy and indecisive as to just how these instructions or directions were communicated from the Communist Party to Bridges, and it is based upon the preposterous proposition that the needs and demands of the longshoremen on the West Coast in 1934 and 1936 were not real but were the figment of the imagination of Communist Party officials. It is a proposition too ludicrous to be accepted by this Court.

The fact of the matter is that, insofar as it was possible to get any specificity from the Government's witnesses, their evidence revealed that the so-called instructions which appellant Bridges was supposed to have received from, and followed at the direction of, the Communist Party, were all matters dealing with bona fide, legitimate, trade union problems that had nothing whatsoever to do with the question of communism.

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[4]The expressions of the Courts in this regard are considered below.

Among the instructions seriously suggested by the Government's witnesses as evidence of Bridges' Communist Party membership were instructions "to build the union", to "raise the demands of the men", to "proceed up and down the coast with the Rank and File committee", "the setting of a date for the strike," (Tr. 889), "the organization of the Maritime Federation of the Pacific" (Tr. 891), "to consider the best strategy and tactics in the strike" (Tr. 906), "the question of revitalizing the ILA [union]". (Tr. 968, 971-2.)[5]

The demands, which it was testified the Communist Party instructed appellant Bridges to raise, were "a dollar an hour and a six hour day and a 30-hour week, and a hiring hall". (Tr. 978.)

Government witnesses testified that Bridges accepted such advice or instructions "because it was a chance to build a union". (Tr. 972.)

The witness Schomaker admitted that these demands had nothing to do with communism, that they were ordinary, good trade unionism. (Tr. 1182-84.) The witness Schrimpf supported this view. He stated that all through the 1934 strike the objectives which he ascribed to the Communist Party were first, to keep up the morale of the men, second, to eliminate the bad working conditions, third, to get some

[5]The evidence dealing with articles written by Bridges for the *Waterfront Worker* falls into the same category. It is clear that even if some members of the Communist Party had an interest in this paper, Bridges was concerned with utilizing it to help build the union. (Tr. 821, 831.)

kind of job security, and finally, to improve the working hours. (Tr. 1398-1400.) All of these, he admitted, were legitimate trade union objectives and all were finally adopted by the President's Board which was appointed to settle the strike. (Tr. 1000, 1409.)

Finally, this witness admitted that to the extent that Bridges and the others took any advice or assistance from any Communist Party members, they did so because the men who were seeking to organize and build the union were then young, inexperienced and new in this field, whereas the Communist Party members involved were experienced and competent trade unionists. (Tr. 1389, 1401.)

These dealings of the appellant Bridges with members of the Communist Party were not denied by him, nor have they been over the years. Judge Healy said

> "In the main there is no dispute concerning these circumstances. The bulk of them had long been known alike to the authorities and the general public, and were freely admitted by the alien himself. Nearly all of them had been evaluated and discarded by Inspector Landis and by the Department upon the first trial." (*Bridges v. Wixon,* 144 F. 2d 927, 940 [9 Cir. 1944].)

The Courts had held that this course of conduct did not constitute even "affiliation" with the Communist Party, much less membership in it. Justice Douglas said:

> "But he who cooperates with such an organization only in its *wholly lawful activities* cannot

by that fact be said as a matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term 'affiliation' in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months or years although their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a prescribed organization *in order to win a legitimate objective* in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of of the prescribed organization as distinguished from mere cooperation with it in its lawful activities. The act or acts must evidence a working alliance to bring the program to fruition." (*Bridges v. Wixon,* 326 U.S. 135, at 143-144 [1945].)

It will be noted that in order to constitute even affiliation, the Court held that the act or acts in question must evidence a working alliance to bring "the

program'' to fruition. That is to say, the program of the proscribed organization. Here, if there was a working alliance, it was only a working alliance to bring to fruition *the program of the Union.*

Taking this evidence at its strongest, it is clear that it falls far short of independently establishing either the fact or membership or Bridges' belief that the statement given under oath in Judge Foley's Court was not a true statement.

The lack of substantiality of this evidence and of the entire record in this case brings to mind Judge Healy's observation that:

> "It is notable that the alien in one fashion or another has been under almost continuous investigation for a period of more than five years. Prior to and during the course of the second trial, the service had enlisted the powerful cooperation of the Federal Bureau of Investigation. The country had been scoured for witnesses. Every circumstance of Bridges' active life had been subjected to scrutiny and presumably no stone left unturned which might conceal evidence of the truth of the charges which the alien so flatly denied. The most significant feature of the inquiry as it seems to me is the paucity of the evidentiary product as contrasted with the magnitude of the effort expended in producing it * * *'' (*Bridges v. Wixon,* supra, 144 F. (2d) at 940.)

Finally, one cannot get away from what Justice Douglas said about the import of evidence of this kind.

"So far as this record shows the literature published by Harry Bridges, the utterances made by him, were entitled to that [constitutional] protection. They revealed a militant advocacy of the cause of trade unionism *but they did not teach or advocate or advise the subversive conduct* condemned by the statute.

"*Inference must be piled on inference to impute belief in Harry Bridges of the revolutionary aims of the groups whose aid and assistance he employed* **in his endeavor to improve the lot of the working man on the waterfront.** That he enlisted such aid is not denied. He justified that course on the grounds of expediency—to get such help as he could to aid the cause of his union. But there is evidence that he opposed the Communist tactics of fomenting strikes; that he believed in the policy of arbitration and direct negotiation to settle labor disputes, with the strike reserved only as a last resort. As Dean Landis stated in the first report:

'Bridges' own statement of his political beliefs and disbeliefs is important. It was given not only without reserve but vigorously as dogma and faiths of which the man was proud and which represented in his mind the aims of his existence. It was a fighting apologia that refused to temper itself to the winds of caution. It was an avowal of sympathy with many of the objectives that the Communist Party at times has embraced, an expression of disbelief that the methods they wished to employ were as revolutionary as they generally seem, but it was unequivocal in its distrust of tactics other than those that are generally included within the concept of democratic methods.

That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits.'" (*Bridges v. Wixon,* supra, 326 U.S. at 148-149.)

II. OTHER EVIDENCE.

A. The alleged admission.

The government produced two witnesses, Shomaker and Irene Harris, who testified to an alleged oral unsworn admission by appellant Bridges that he was a member of the Communist Party.

This evidence is inherently improbable.[6] This Court is asked to believe that appellant Bridges made such an admission at a public gathering with many strange and unknown persons present, at a time when he was under arrest on a warrant of deportation which was based upon the very claim of such membership. Appellant Bridges, as the record shows, had been under surveillance and knew he had been under surveillance for many years. He had, and he knew he had, many powerful enemies. The country had been scoured, as he knew, for any evidence of any kind that would connect him with the Communist Party. And yet for no good reason, at a small gathering of this kind when no important or useful function could be served, he is claimed to have made an admission

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[6] "It is a wild conceit that courts are bound by mere swearing. It is credible swearing which is required."

which would expose him utterly to any stranger in the group who would then be in a position to deliver him to his enemies. It is just too much to believe that such an incident ever took place.

The law quite correctly regards admissions with extreme caution since evidence of this type is easy to assert but almost impossible to disprove. It is subject moreover to the great danger of misinterpretation. The loose use of language, particularly in connection with matters here under consideration, is commonplace. Even astute witnesses and law enforcement officers constantly fall into the error of failing to discriminate in using the word "communists" and "members of the Communist Party". Examples of this in the testimony of the witnesses and the statements of the government prosecutors run throughout the record.

Appellant Bridges himself has repeatedly stated, and undoubtedly did on the occasion under consideration, that he and his union supported certain programs and policies and would continue to support such programs and policies despite the fact that others called them "communistic". He testified in connection with this very incident that in all probability he said: "Look; here is what we stand for; here is what we are trying to do. Here is our program. Here is what we are trying to do. If these things are communistic, then we are communists." (Tr. 4897.) The distinction between this statement and a statement that appellant was a member of the Communist Party is of course tremendous.

Furthermore, the testimony in question is not the independent testimony of two separate witnesses. The record is clear that just shortly prior to the time of the trial one of the witnesses had brought the alleged incident sharply to the attention of the other. (Tr. 1725).

Finally as a matter of law, oral unsworn admissions uncorroborated—as was this one—do not fit the special rule relating to the sufficiency of evidence in perjury cases.

U. S. v. Wood, 14 Pet. 430 (1840);
Clayton v. U. S., 284 F. 537, 540 (4 Cir., 1922);
Phaer v. U. S., 60 F. (2d) 953, 954 (3 Cir., 1932);
Hart v. U. S., 131 F. (2d) 59, 61 (9 Cir., 1942);
Fotie v. U. S., 137 F. (2d) 831, 840 (8 Cir., 1943).

B. The alleged application of appellant Bridges for membership in the Communist Party.

Schomaker testified to an alleged incident with respect to the signing of an application card for membership in the Communist Party by appellant Bridges. However, this testimony has an interesting aspect, an aspect which reveals its utter falsity. After a very elaborate build-up concerning the preliminary circumstances under which this alleged application for membership was allegedly executed by appellant Bridges (Tr. 833-840) this witness stated that he was called out of the restaurant where he, Bridges and a third person had been, remained away for fifteen or twenty

minutes, and did not see Bridges again on that occasion. (Tr. 841.) In other words according to his own testimony he left and was not present at the time that Bridges allegedly signed an application card for membership in the Communist Party. His testimony that Bridges did sign a card is therefore hearsay and at best highly circumstantial. Not only was this testimony uncorroborated from any other source and flatly denied by Bridges (Tr. 4899-4900), but the third person whom Schomaker said was present and the only one besides Bridges who could therefore possibly know the facts, categorically denied that the incident had ever occurred (Tr. 3813-3814, 3880).

In any case since there was no corroboration of Schomaker on this point the evidence was insufficient to sustain a conviction in view of the rule required in perjury cases.[7]

C. The alleged payment of dues and the receipt of Communist Party membership books.

The same witness Schomaker testified that for several years after 1934 he received from Bridges old Communist Party membership books in return for which he gave to Bridges new books, claiming that this was part of a procedure by which the Communist Party "controlled" (Tr. 867-873) its membership. This witness also testified that he saw Bridges pay what he, the witness, characterized as Communist Party dues to persons whom he, the wit-

[7]See infra, pp. 25-28.

ness, testified were Communist Party dues secretaries. Over objection the witness was permitted to characterize both the money and the people, without any adequate foundation having been laid. (Tr. 873-874.)

This testimony like the earlier testimony of this witness was uncorroborated, was flatly denied by Bridges (Tr. 4900), and in no case did the government produce any of the witnesses to whom Schomaker made reference. There was no showing that they were not available to the government, on the contrary the record indicates that at least one of them—Mann—had been interviewed by a government agent and subpoenaed to appear before the grand jury which returned the indictment. (Tr. 3605; Def. Ex. K-1.) In any case the burden of establishing the fact beyond a reasonable doubt, and of properly corroborating it as required by the perjury rule, was on the government. There was no burden upon appellant Bridges to meet the testimony which was not properly in the record and which was not sufficiently corroborated to sustain a finding against him.

It has long been the law in perjury cases that testimony of one witness is not sufficient to sustain conviction; there must be at least the testimony of two independent witnesses or the testimony of one witness plus independent evidence which is inconsistent with the innocence of the defendant.

Undoubtedly the government will argue that Schomaker's testimony now under consideration is corroborated by the testimony of Bridges' attendance at the meetings which we have described above. However such testimony, as we have already seen, is not inconsistent with the innocence of Bridges. On the contrary, the government witnesses who gave it clearly established by their own evidence this testimony does not have the slighest probative value on the question of actual membership in the Communist Party. That being the case, such testimony cannot be regarded as legally sufficient to corroborate Schomaker.

In *United States v. Isaacson,* 59 F. (2d) 966, 967-968 (2 Cir., 1932), the Court said:

> "The ancient rule that required the testimony of at least two witnesses to prove the crime of perjury has, indeed, been relaxed. Hashagen v. United States (C.C.A.) 169 F. 396. But what may be called the modern equivalent of this requirement still obtains. This general rule now requires the oath of one witness to be supported by that of another or by some *other independent evidence inconsistent with the innocence of the defendant.* United States v. Wood, 14 Pet. 430, 10 L. Ed. 527; Allen v. United States (C.C.A.) 194 F. 664, 39 L.R.A. (N.S.) 385; United States v. Otto (C.C.A.) 54 F. (2d) 277. Otherwise there would be but oath against oath and on the theory, I suppose, that each would give the other the lie direct, there would be no sound basis for letting a jury reach the conclusion that

> the oath against a defendant so overbalanced his own that his guilt was proved beyond a reasonable doubt. At least, this puts the requirement on rational ground as was pointed out in Cohen v. United States (C.C.A.) 27 F. (2d) 713. That case dealt with subornation of perjury, but the principle involved is the same. Hammer v. United States, 271 U.S. 620, 46 S. Ct. 603, 70 L. Ed. 1118."

Several years later a determined effort was made by the government to convince the Supreme Court that this rule should be abandoned in perjury cases. However, the Court unanimously rejected the government's position, and in *Weiler v. United States,* 323 U.S. 606, 608-611 (1945), said:

> "The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty

and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony. *Since equally honest witnesses may well have differing recollections of the same event,* we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule * * *

* * * The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the

corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury. Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is *to bar a jury from convicting for perjury on the uncorroborated oath of a single witness.*"

III. THE TESTIMONY OFFERED BY THE GOVERNMENT IS NOT WORTHY OF BELIEF.

A careful examination of the circumstances under which the various witnesses for the government testified indicates that their testimony must be viewed with the gravest suspicion. It is more than a coincidence that, since the chief branch of the government interested in advancing the cause of this prosecution was the Immigration and Naturalization Service, a good many if not a majority of the government's witnesses were persons who in one way or another had some previous contact with that agency, and who, it is clear, had much to fear in way of possible reprisals should they incur the ill-will of any of the officials of that agency.

The witnesses Schrimpf, Krolek, Irene Harris, and Ross are all naturalized citizens. In the case of

Krolek and Ross citizenship was claimed to be "derivative" based upon the alleged citizenship of their fathers. In the case of Mrs. Harris it was necessary for her to reinstate citizenship which she had lost by marriage to an alien. Schrimpf, like Bridges, had been born in Australia.

The interesting thing in the case of Schrimpf is the fact that he claimed Bridges to have been a member of the Communist Party during precisely the same time he admits to membership. Yet he had no difficulty in becoming naturalized in 1943, at a time when he was required to and did swear under oath that for ten preceding years he had not been a member of or affiliated with any organization which taught or advocated the overthrow of the government by force and violence. By his own admission, then, Schrimpf lied when he obtained his citizenship in 1943.[8] By the government's theory on the statute of limitations, Schrimpf was liable to prosecution for the precise crime alleged in the second count of the indictment at the time he testified against Bridges in 1949.[9]

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[8]This must follow if the question put to Bridges in 1945 relating to membership in the Communist Party was material to the inquiry before Judge Foley.

[9]In this connection it is interesting to note the prosecutor's suggestion that membership in the Communist Party did not make false a negative answer to the question with respect to membership in an organization teaching or advocating overthrow of the government by force and violence at the time of Schrimpf's naturalization. (Tr. 5777.) If the prosecutor was right in this regard, then of course the question put to Bridges in 1945, and upon which the second count of the indictment is based, was an immaterial question. (See Appellant's Opening Brief, 175-180.)

In addition to the fact that many of the witnesses were aliens who at one time or another had had relations with the Immigration and Naturalization Service which undoubtedly would make them more amenable to whatever pressures that service exercised to procure witnesses against Bridges, is the fact that at least two of the witnesses had been government employees and had also answered in the negative questions concerning past membership in subversive organizations, despite their present admission that they had been members of the Communist Party. We refer to the witnesses Wilson and Michener. In the case of Michener, it is interesting to note that his personnel file for some reason or another was incomplete and, although there was every indication from the record that he took the oath in question, the oath itself was not contained in the file. (Tr. 5755-5770.)

In the next place, the record reveals other pressures to which government witnesses were subjected. Rathborne, for example, had been voting continuously in both state and federal elections despite the fact that since 1928 he had been convicted of a felony. (Tr. 6025-6028.) It is interesting to note here that the Immigration and Naturalization Service, which should have had nothing to do with these matters (for Rathborne apparently was not an alien), took it upon itself to have the District Director of Immigration and Naturalization in San Francisco arrange with the Los Angeles Superior Court, shortly before

Rathborne was due to testify, to have the felony record "expunged". (Tr. 6410-6419; 6900-6921.) Of course this does not change the fact that prior to the time the record was expunged Rathborne had been repeatedly violating the law.

In the next place, the record shows a continuous and constant exertion of pressure by Immigration Service agents against practically every one of the witnesses from the time the agents approached a witness until they finally induced him to testify; they spent days, weeks, and months in constant and repeated visits and interviews. They went from coast to coast and found people in the most unlikely places. Stanley Hancock was found in Erie, Pennsylvania, and Lawrence Ross in Memphis, Tennessee. Hundreds of pages of record are devoted to the comings and goings of Michener and the immigration agents in Los Angeles (Tr. 3379-3422), and Rathborne and the immigration agents in and around the Bay Area, Los Angeles, and Washington, D. C. (Tr. 6035-6165).

In many cases the witnesses told the agents that they knew nothing of Bridges' alleged Communist Party membership, but the agents kept after them and after them until finally they were compelled to testify.

In the case of at least two witnesses the record is clear that substantial sums of money were paid for their testimony. Although an effort was made to disguise these payments as witness fees or salary, it is perfectly obvious that in the case of both Crouch and

Rathborne the fees were given directly for the testimony. There was no reason why the witness fees in the case of Crouch should have been doubled by paying a similar set of fees to his wife, and there is no reason why in the case of Rathborne the government should have expended the sum of $5,000 to procure his testimony. (Tr. 6152, 6538-6552.)

Another phenomenon which we find in this case is the appearance of the professional witness. Both Crouch and Johnson had been used over and over again by the government in other proceedings. Johnson had testified in almost two dozen cases before he testified against Bridges. (Tr. 2111-2126.) Crouch had already testified in about ten cases in the short space of six or seven months before he was called as a witness in this one. (Tr. 2477-2487.) For their services these men were handsomely rewarded. It is perfectly obvious they would testify to anything in order to maintain their positions. They had nowhere else to turn, and unless they made themselves useful to the government in the prosecution of this and similar cases their only source of livelihood would be destroyed.

There is a final factor to be considered in connection with the testimony of these witnesses. It is precisely because they exist at all times on the mercy of the government and must maintain their standing with the government, that they have no compunction about committing the most flagrant and obvious kind of perjury. Crouch and Johnson were caught in the

most barefaced lie when they said that they saw Bridges at a meeting of the Central Committee of the Communist Party in New York on or about June 27, 1936. The record is clear beyond a shadow of a doubt that Bridges was in Stockton, California, on that date. Yet these two men, who must have known that they did not see Bridges in New York when they said they did, had no hesitation about testifying to this false fact. The fact that the government has not taken steps against them, and that they are still today being used as professional witnesses in other cases, shows the freedom that these men feel from the normal restraints which otherwise inhibit other witnesses.

The same is true to an even more startling degree of witness Ross. The falsity of his testimony was not revealed by objective contradictory evidence, as was the falsity of the testimony of Crouch and Johnson; the evidence of his perjury came from his own lips. For almost a week this witness sat on the witness stand and repeatedly lied concerning his name, his background, his origin, his education, and related subjects. Not only did he lie about these matters on his direct examination, but he lied about them on his cross-examination, and it was not until it became perfectly obvious that further examination was going to destroy the whole fabric of falsehood he had created that he confessed to his perjury. Yet this man, too, has never been called to account for the perjury which he committed in the United States District

Court for the Northern District of California. He too has been permitted to leave the jurisdiction and go on his way.

In connection with this witness it is significant to observe that although government counsel admitted that it was even apparent to them that the witness was not testifying truthfully as of a late Friday afternoon (Tr. 3314)[10] that same counsel tried with all the vigor at his command to have the witness excused and removed from the jurisdiction (Tr. 3143-3158), so that the falsehoods which were about to be exposed would never be exposed. There is no question that were it not for the timely intervention of telegraphic information late Friday afternoon (Tr. 3148, 3152) this witness would have been excused and permitted to go his way without his falsehoods ever having been revealed.

The final witness to be considered in this regard is Rathborne, who freely admitted to more than a dozen incidents of perjury before investigating committees of the House of Representatives and the Legislature of the State of California. In explaining those perjuries the witness committed further perjury in this very proceeding. He offered the explanation that, having been subpoenaed before the House committee, he consulted with an alleged leading officer of the Communist Party and was instructed to commit

[10]It is interesting to note that as soon as cross examination of this witness began to touch upon matters dealing with his personal life vigorous objections were interposed by government counsel. (Tr. 3100-3102.)

perjury. (Tr. 5937, 5947, 5975.) This, of course, would hardly excuse the commission of perjury; but the very explanation itself was false, for the record revealed that far from having been subpoenaed this witness voluntarily requested an opportunity to appear before the House Committee. (Tr. 5983.) When confronted with the record, he admitted that his previous testimony in this very trial was false and he further admitted that when he requested the opportunity to appear before the House Committee he did so fully intending to give perjured testimony. (Tr. 5986-5988.)

This witness, perhaps more than any other, expressed the utter impossibility of ascertaining when he was telling the truth. The following excerpts from his testimony speak eloquently on this subject.

"Q. Now, Mr. Rathborne, as a matter of fact, you never have been a member of the Communist Party, have you?

A. I testified and I was a member of the Communist Party from 1935 until early in 1947.

Q. When did you testify to that?

A. I believe on direct examination.

Q. You testified to it under oath, as you understand it?

A. Well, I was under oath at the time, and I will state that now.

Q. In other words, being sworn to tell the truth, the whole truth and nothing but the truth, you testify that for a certain period of time you had been a member of the Communist Party, is that right?

A. That's right. I repeat that testimony now.

Q. Back in 1940, and subsequently in 1941, being put under oath and sworn to tell the truth, the whole truth and nothing but the truth, first before the Un-American Activities Committee of Congress, and next before the Tenney Committee of the State Legislature, being asked that question, you denied that you had ever been a member of the Communist Party; isn't that right?

A. That is right.

Q. And the two answers embraced the same period, isn't that right?

A. Well, yes; I mean the same period is included.

Q. You were under oath on both occasions?

A. That's right.

Q. Do you know of any way—can you tell me of any way by which one can determine which time you were telling the truth?

* * * * * * *

A. As far as my appearance in this proceeding, I can only say what I said before: It is up to the Court and the jury based on the evidence that I give and the evidence that other witnesses give, to determine the value or the weight and the truthfulness of my testimony * * * And I will state, if you want me to, that I am doing my utmost to adhere strictly to the truth in this testimony I am giving now.

Q. You said that down at Washington, didn't you, and you said that before the Tenney Committee. What I want to know is this——

A. Apparently in that there is an irrecon— a contradiction which you cannot reconcile." (Tr. 6622-6624.)

"Q. Let us get back to the original situation. Therefore, a person who is a Communist under such direction or education can deny under oath that he is a member of the Communist Party, can't he?

A. He can, yes.

Q. He can deny that another member is a member of the Communist Party?

A. That is right.

Q. Even though that person might be a member of the Communist Party?

A. That is right.

Q. He can also say that another person who is not a member of the Communist Party is a member of the Communist Party, can't he?

A. Well, I don't know of any particular incident, but following the line of reasoning, I would say that would be logical.

Q. All right. He could also state falsely that he had left the Communist Party, couldn't he?

A. I suppose he could.

Q. In other words, being still in the Communist Party, he could pretend that he had left the Communist Party, couldn't he?

A. I presume he could. I don't know of any instance of that kind.

Q. And having left the Communist Party, he could pretend that he was still in the Communist Party, couldn't he?

A. I guess any of those combinations of circumstances would be covered by the general——

Q. And he could, if there were a meeting of certain persons, he could falsely state that it was not a Communist meeting, couldn't he?

A. I believe that is right, yes, sir.

Q. And he could falsely state it was a Communist meeting, couldn't he?

A. I believe he could——" (Tr. 6627-6628.)

The foregoing demonstrates that the evidence is circumstantial, uncorroborated, incredible, and totally insufficient to sustain the conviction of appellant Bridges on the second count of the indictment.

Dated, San Francisco, California,
September 7, 1951.

Respectfully submitted,
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